

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Stow Municipal Electric Department )

v. ) D.T.E. 94-176-C

Hudson Light and Power Department )

\_\_\_\_\_)

HUDSON LIGHT AND POWER DEPARTMENT'S BRIEF IN OPPOSITION  
TO THE MOTION FOR SUMMARY DISPOSITION OF  
STOW MUNICIPAL ELECTRIC DEPARTMENT

In its motion for summary disposition ("Motion"), filed with the Department of Public Utilities ("Department") on April 18, 2000, the Stow Municipal Electric Department ("SMED") relies on two arguments that have been fully briefed and rejected by both this Department and the Supreme Judicial Court ("SJC"). By reasserting these arguments during this remand phase, SMED asks this Department to ignore its prior decision and overrule the controlling SJC opinion.

A. THE DEPARTMENT AND THE SUPREME JUDICIAL COURT HAVE PREVIOUSLY HELD THAT SECTIONS 42 AND 43 ARE APPLICABLE

The Motion reprises SMED's prior argument that the "more specific" St. 1898, c. 143 (the "1898 Statute") controls over the "more general" G.L. c. 164, §§ 42 and 43. SMED's position with respect to the two statutes has undergone several incarnations over the past five years, but its "specific vs. general" argument has been explicitly rejected by this Department, and implicitly rejected by the Supreme Judicial Court which expressly held that § 43 is the applicable statute.

1. Procedural History

In its Initial Brief, filed with the Department on August 31, 1995, SMED argued that "[t]he statutory scheme, G.L. c. 164, §§42 and 43, and St. 1898, c. 143, excludes consequential damages of the type sought by HL&PD . . . ." Initial Brief at 11. Furthermore, SMED saw no contradiction between the two statutes upon which it relied. "The special statute under which HL&PD serves Stow, St. 1898, c. 143, incorporates by reference the provisions of G.L. c. 164, §§42 and 43 which are consonant and not inconsistent with St. 1898, c. 143." (emphasis added). Id. at 12. SMED further argued that "[t]he limited subject of purchase, and the limited property which is subject to purchase, as delineated by the Special Act, St. 1898, c. 143 . . . is not altered by the severance language in current law. Indeed, G.L. c. 164, § 43 reaffirms that only tangible property is to be purchased . . . ." Id. at 13.

## Untitled

SMED first asserted that the 1898 Statute and G.L. c. 164 § 43 were inconsistent in its Reply Brief, filed with the Department on September 14, 1995. "The more specific language of the special statute (St. 1898, c. 143, § 2) controls and limits the more general language of the general statute (G.L. c. 164, § 43) relied upon by HL&PD for its agreement." Reply Brief at 2.

### 2. The Department Has Previously Disposed of SMED's Argument

In its Order No. 94-176, issued on February 16, 1996 (the "1996 Order"), the Department addressed both of SMED's statutory arguments. First, the Department noted that "SMED argues that the Enabling Act, a special act, incorporates by reference (by means of its reference to §§12-14 of c. 370, St. 1891) the provisions of Sections 42 and 43, a general act, which are consonant and not inconsistent with the Enabling Act." 1996 Order at 6. Then, the Department acknowledged SMED's alternative argument. "SMED further states that the provisions of St. 1898, c. 143, § 2, control in this matter, arguing that the more specific language of a special statute (St. 1898, c. 143, § 2) controls and limits the more general language of a general statute (G.L. c. 164, § 43)." Id.

The Department's Order fully appreciated these two arguments. "The issue raised by the parties is whether the Enabling Act's reference to St. 1891, c. 370, §§ 12-14 incorporates the purchase terms and procedures in their form in 1898 when the Enabling Act was enacted, or as they may be changed from time to time." Id. at 9. The Department held that since "[t]he Enabling Act contains a reference to limited and particular provisions of another statute . . . the Enabling Act is a statute of specific reference." Id. at 10. For that reason, the Department concluded, "the referencing language in St. 1898, c. 143, § 2 must be read to mean that the law is as St. 1891, c. 370 currently reads . . . The current version of St. 1891, c. 370, §§ 12-14 is codified at G.L. c. 164, §§ 42 and 43. Thus, Sections 42 and 43 are controlling." (emphasis added). Id. Again at p. 18 of the 1996 Order, the Department clearly stated that "Sections 42 and 43 govern the terms and procedure of this purchase. Therefore, the Department must interpret the meaning of the term 'property' as used in Section 43." Thus, the 1996 Order rejected SMED's "trumping" argument and clearly held that the General Laws are controlling.

### 3. SMED Chose to Revert to its Original Position on Appeal

On appeal to the Supreme Judicial Court in 1997, SMED failed to raise the "trumping" issue and instead shifted back to its original "consonant and not inconsistent" position. "The special statute under which HL&PD serves Stow, St. 1898, c. 143, incorporates by reference the provisions of G.L. c. 164, §§42 and 43 which are consonant and not inconsistent with St. 1898, c. 143." Reply Brief at 8 (May 9, 1997) ("SJC Reply Brief"). Again, "[t]he special statute that permitted HL&PD to serve Stow (St. 1898, c. 143) incorporated by reference the relevant and not inconsistent portions of the then-existing Municipal Ownership Law, St. 1891, c. 370, §§12-14." (emphasis added). Id. at 14.

The SJC reversed the Department's decision denying Hudson stranded costs. *Stow Municipal Electric Department v. Department of Public Utilities*, 426 Mass. 341, 342 (1997). In so doing, the Court applied the "more general" law (to use SMED's terminology), G.L. c. 164, §43. "As we read § 43, the department may award a utility stranded costs associated with a customer's departure when it is in the public interest to do so." Id. at 350. Accordingly, the SJC's opinion sets forth the proper statute to be applied on remand.

### 4. SMED's Position Has Already Been Twice Rejected

Nevertheless, SMED filed a motion for summary disposition and accompanying memorandum of law ("SMED Brief") with the Department on April 18, 2000, which re-asserts its old argument that the 1898 Act "trumps the General Laws by establishing precisely what property is to be included in the sale . . ." SMED Brief at 2. Boldly stating that "the Department's legal analysis in this case has never

#### Untitled

confronted the limited statutory authority possessed by the Department," *id.*, SMED ignores the clear reasoning of the 1996 Order, completely discounts the SJC's application of G.L. c. 164, § 43, and instead invites this Department to summarily ignore its own prior ruling and the SJC's decision.

In support of its re-presentation of previously rejected statutory construction, SMED proffers the explanation that its "trumping" argument "has been misunderstood and/or avoided throughout this litigation, and not addressed on the merits by either this Department or the Supreme Judicial Court . . ." SMED Brief at 4. SMED overlooks the fact that this Department's 1996 Order clearly held that the 1898 Statute incorporated by reference G.L. c. 164, §§42 and 43 and that therefore "Sections 42 and 43 are controlling." (emphasis added). 1996 Order at 10. Instead, SMED argues afresh that in its 1996 Order, the Department "never address[ed], indeed miss[ed], the critical issue in this case - that . . . the Special Act precludes the application in this case of that currently conflicting provision of G.L. c. 164, § 43 . . ." SMED Brief at 7. Respectfully, HL&PD submits that this Department previously both addressed and appreciated the "critical issue in this case," and clearly held that §§ 42 and 43 are applicable.

In its Reply Brief to the SJC, SMED chose to abandon its "trumping" argument in favor of its original position that the 1898 Statute and G.L. c. 164, §§42 and 43 are "consonant and not inconsistent." SJC Reply Brief at 8, 14. SMED cannot now be heard to complain that the SJC did not sufficiently discuss its "trumping" argument "on the merits." Failure to brief or argue an issue on appeal is equivalent to a waiver of the claimed error. *Barclay v. DeVeau*, 384 Mass. 676, 683, 429 N.E.2d 323, 327 (1981) ("The defendant has failed to argue on appeal any error on this issue. We therefore deem any claim of error to be waived."); *Doherty v. School Committee of Boston*, 6 Mass. App. Ct. 805, 807, 384 N.E.2d 228, 229 (1979) (Where defendants "failed to argue their appeal on the merits," they are "precluded from questioning the propriety of any of the findings and rulings made by the judge which were adverse to the contentions they raised below.").

#### 5. Conclusion

While the SJC did not specify the reasoning behind its application of G.L. c. 164, §43, it clearly held that the General Laws apply. *Stow Municipal*, supra, 426 Mass. at 350. By so doing, the high court squarely rejected any notion of "trumping" now re-proffered by SMED. The SJC has unequivocally stated what law is to be applied on remand, a determination which is in harmony with this Department's own Order issued in 1996. SMED's stale "trumping" argument is foreclosed at this point, having been asserted five years ago, rejected by the Department, left by the wayside on appeal, implicitly rejected by the SJC, and then raised yet again under the guise of a motion for summary judgment. SMED's obvious dissatisfaction with the applicability of § 43 is not a proper ground for this Department to re-open its earlier, correct decision on the matter or to ignore a controlling decision of the SJC.

#### B. HUDSON LIGHT & POWER DEPARTMENT HAS THE OPTION TO REFUSE TO SELL THE ASSETS TO STOW

HL&PD is mystified by SMED's statement that Section 2 of the Special Act of 1898 "prohibits HL&PD from refusing to sell its plant and equipment in Stow at the end of this proceeding, as HL&PD is threatening illegally to do", suggesting that HL&PD's position is a surprise to SMED. See Motion at 3, f.n. 2. This matter was raised and decided years ago, and SMED has foregone its right to revisit it during the remand phase.

#### 1. Procedural History

At the first pre-hearing conference in this proceeding over five years ago, HL&PD

#### Untitled

articulated its position that if Stow votes to accept the Department's determination under G.L. c. 164, § 43, HL&PD would have the right to decide whether or not to accept the determination.

Mr. Connolly: We can go through this proceeding; and at the end of it, after the Department has spent great time and resources, Stow will submit it to a Town vote . . . at least that is their position . . . and at that point in time they'll decide whether or not to accept the Department's determination.

Similarly, it is Hudson's position that we also have the right to decide at that point in time after the Department's decision as to whether or not we accept. If we don't accept and we don't submit to sell, Stow is then allowed to go forward and do what it wishes. It can overbuild or do whatever else.

I raise this issue now because I think it's an important issue to have on the record so that everyone understands.

See Tr. 2/9/95, p. 7. In its Prehearing Brief filed April 6, 1995, HL&PD reiterated its position and further explained that requiring HL&PD to tender the property to SMED at the price set by the Department would render § 43 unconstitutional. Prehearing Brief at 4, f.n. 1. The United States Supreme Court has held that a determination of fair value in eminent domain cases is a judicial question, not a legislative one. *Baltimore & Ohio R.R. Co. v. United States*, 298 U.S. 349, 365, 56 S. Ct. 797, 806, 80 L. Ed. 1209 (1936) ("The Legislature may determine what private property is needed for public purposes -- that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial."). Therefore, requiring HL&PD to tender the properties to Stow at the price set by the Department would violate the Fifth Amendment to the U.S. Constitution. SMED disagreed and fully briefed the issue, arguing that only SMED has the choice to decline to consummate the transaction. SMED Prehearing Brief at 58.

#### 2. SMED's Position Has Been Previously Rejected

The Department adopted HL&PD's position in the 1996 Order:

We note that issuance of this Order does not finalize the sale. Stow must vote again on the purchase, and there must be an offer and acceptance. Based on the findings in this Order, the Department has set out sufficient guidelines to facilitate a recalculation by the parties, if they so choose, of a sale price at a future date.

D.P.U. 94-176, p. 80, n. 44 (emphasis added). SMED never sought reconsideration of the Department's Order on this point, and failed to raise it on appeal to the Supreme Judicial Court. However, the SJC interpreted Section 43 to assign the responsibility of determining a "fair value" for the property in question to the Department. *Stow Municipal*, supra, 426 Mass. at 345 ("The department's goal under this statute is to set a purchase price that represents a 'fair value.'"). By so doing, the SJC necessarily rejected SMED's contention that HL&PD has no discretion whether to sell the property at the conclusion of these proceedings. In takings cases, the determination of "fair value" must be set by the judiciary and not by a legislative body. See *Baltimore & Ohio R.R. Co.*, supra, 298 U.S. at 365. Therefore, in order for Section 43 to be constitutional, the disposition of HL&PD's property cannot be a taking; only by allowing HL&PD to decline to complete the transaction will the present situation escape characterization as a taking. Thus, by holding that Section 43 empowers the Department to assess a "fair value," the SJC implicitly held that HL&PD may decline to sell the property to SMED.

#### 3. SMED Waived the Issue on Appeal

Untitled

In addition, SMED's failure to raise the issue on appeal amounts to a waiver of the same. See *Barclay v. DeVeau*, supra, 384 Mass. at 683; *Doherty v. School Committee*, supra, 6 Mass. App. Ct. at 807. The scope of the lower tribunal's jurisdiction on remand is limited by the appellate decision. 5 Am. Jur. 2d APPELLATE REVIEW § 784 ("[T]he lower court is vested with jurisdiction only to the extent conferred by the appellate court's opinion and mandate."). SMED's reassertion of arguments that this Department and the SJC have jointly rejected is an inappropriate invitation to reject the law of the case. Therefore, SMED's argument in its Motion during this remand phase that the Special Act requires HL&PD to sell its assets to Stow should once again be rejected.

For the foregoing reasons, Hudson Light & Power Department respectfully requests that the Department deny SMED's motion for summary disposition.

HUDSON LIGHT & POWER DEPARTMENT

By its attorneys,

---

Paul K. Connolly, Jr.

Méabh Purcell

LeBoeuf, Lamb, Greene & MacRae, L.L.P.

260 Franklin Street

Boston, Massachusetts 02110

(617) 439-9500

Dated: August 22, 2000